A

Chew Thai Kay & Anor v Tenaga Nasional Bhd

B HIGH COURT (IPOH) — CIVIL SUIT NO AA-22NCVC-141–11 OF 2018
MOHD RADZI JC
23 SEPTEMBER 2019

C *Public Utilities — Electricity — Disconnection of electricity supply — Lawful for Tenaga Nasional Bhd ('TNB') to disconnect electricity supply even after alleged tampering of meter had been rectified — Electricity Supply Act 1990, s 38(1) — Issues raised in affidavits by parties showed bona fide questions warranting full trial — Justice of case and balance of convenience favoured granting property owner interim injunction preventing TNB from disconnecting supply until full trial of action*

D

The instant case once again dealt with the question of whether the defendant ('TNB') could disconnect electricity supply to a property even after alleged tampering of electricity meters on the premises had been rectified. The property in the instant case was originally owned by the first plaintiff ('P1') but after it was sold by way of auction, the second plaintiff ('P2') bought the property in 2009 from the buyer at the auction. Despite the change in the property's ownership, TNB's records allegedly still showed that P1 was the registered user. P2 used the premises for processing seafood and then freezing it or keeping it in cold storage. When TNB's employees visited P2's property in late 2018, they discovered that the electricity meters had been tampered with, prompting TNB to issue a notice to P1 that supply to the property would be disconnected pursuant to s 38(1) of the Electricity Supply Act 1990 ('the ESA'). In response to the notice, the plaintiffs filed a writ against TNB claiming for, inter alia, a declaration that the plaintiffs did not tamper with the meter and an injunction prohibiting TNB from disconnecting electricity supply pending disposal of the suit. The instant application was solely concerned the application for the injunction. Among the grounds relied upon were that: (a) P2 had locus standi to file the application since it was the actual user of the electricity; (b) since the alleged tampering of the meter had been rectified, TNB had no basis to disconnect supply; and (c) if the supply was cut, serious damage would be caused to P2's business whereas if the supply was not disconnected, TNB did not stand to suffer any loss. By way of preliminary objections, TNB contended that the plaintiffs had no locus standi to file the suit or the application — P1, for being an undischarged bankrupt and not having obtained sanction from the Insolvency Department to maintain the proceedings; P2, for not having any privity of contract with TNB.

E F G H I

Held, dismissing the preliminary objections and allowing the plaintiffs' application:

(1) P1 had obtained a sanction from the Director-General of Insolvency ('DGI') in June 2018 for his action against TNB in another suit. He had obtained another sanction in March 2019 for the purpose of the instant suit. A sanction issued by the DGI was specific and could only be used for the particular matter for which the sanction was given and could not be used for multiple proceedings. Since P1 had the requisite sanction to proceed with the instant matter, it had the locus standi and therefore the preliminary objection on this point had no merit (see paras 14 & 24).

(2) P2 had shown sufficient proof, as purchaser of the property in question, that it had legitimate interest and business at the said premises and would be adversely affected if TNB disconnected electricity supply. P2 therefore had locus standi to bring the instant application (see paras 27–28).

(3) In *Modernria Plastic Industries (M) Sdn Bhd v Tenaga Nasional Bhd* [2015] 3 CLJ 825, *Mayaria Sdn Bhd & Anor v Tenaga Nasional Bhd* [2015] MLJU 276; [2015] 6 CLJ 788 and *Xin Guan Premier Sdn Bhd v Tenaga Nasional Bhd* [2016] 10 MLJ 788; [2016] 1 CLJ 318, the courts had allowed interlocutory injunctions against TNB until the final disposal of the main action restraining it from disconnecting electricity supply on the ground that with the rectification of the meter tampering in each case, there was no longer any offence subsisting for TNB to still proceed to disconnect supply pursuant to s 38(1) of the ESA. In contrast, the Court of Appeal in *Karun Klasik Sdn Bhd v Tenaga Nasional Bhd* [2018] 3 MLJ 749; [2018] 9 CLJ 184 disagreed with *Modernria* and *Mayaria* and held that the removal of the meter or rectification of the same did not in itself remedy the offence of unlawful abstraction and that so long as monies due to TNB remained unpaid, the electricity that was consumed and not paid for remained an unlawful act or offence under s 37 of the ESA. The issues discussed and the stage and nature of proceedings in Karun Klasik were totally dissimilar to those in the instant case. Since the issues discussed, the nature of the application and the stage of proceedings in the instant case were somewhat akin to the other three cases aforesaid, this Court decided to follow and apply the findings therein (see paras 38–39, 41 & 43–44).

(4) The issues raised by the parties were bona fide and serious enough to merit trial. The affidavit evidence available at the stage of the instant application was insufficient to decide those issues conclusively. P2 stood to suffer greater injustice if the relief sought was withheld. It was just and proper for the injunction to be issued to maintain the status quo until trial. The balance of convenience and justice of the case favoured the plaintiffs (see paras 45–49).

[Bahasa Malaysia summary

Kes semasa sekali lagi menangani persoalan sama ada defendan ('TNB') boleh memutuskan bekalan elektrik ke hartanah walaupun selepas dakwaan penyalahgunaan meter elektrik di premis telah diperbetulkan. Hartanah dalam kes ini pada asalnya dimiliki oleh plaintif pertama ('P1') tetapi selepas ianya dijual melalui lelongan, plaintif kedua ('P2') membeli hartanah tersebut pada tahun 2009 dari pembeli lelongan tersebut. Walaupun hartanah tersebut telah bertukar pemilik, rekod TNB menyatakan bahawa P1 adalah masih pengguna berdaftar. P2 menggunakan premis tersebut untuk memproses makanan laut dan kemudian membeku atau menyimpannya dalam simpanan sejukbeku. Apabila kakitangan TNB melawat hartanah P2 pada akhir 2018, mereka mendapati meter elektrik telah dirosakkan, mendorong TNB untuk mengeluarkan notis kepada P1 bahawa bekalan elektrik ke hartanah tersebut akan diputuskan berdasarkan kepada s 38(1) Akta Bekalan Elektrik 1990 ('ABE tersebut'). Sebagai menjawab kepada notis tersebut, plaintif memfailkan writ terhadap TNB bagi menuntut, antara lain, suatu deklarasi bahawa plaintif tidak merosakkan meter dan injunksi yang melarang TNB daripada memutuskan bekalan elektrik sementara menunggu keputusan tindakan tersebut. Permohonan semasa adalah semata-mata berdasarkan kepada permohonan untuk perintah injunksi tersebut. Antara alasan yang diguna pakai adalah: (a) P2 mempunyai locus standi untuk memfailkan permohonan itu kerana beliau adalah pengguna sebenar bekalan elektrik tersebut; (b) kerana penyalahgunaan meter telah diperbetulkan, TNB tidak mempunyai asas untuk memutuskan bekalan elektrik; dan (c) jika bekalan dipotong, kerosakan yang serius akan dialami oleh perniagaan P2 sekiranya bekalan tidak diputuskan, TNB tidak akan mengalami sebarang kerugian. Melalui bantahan awal, TNB berpendapat bahawa plaintif tidak mempunyai locus standi untuk memfailkan saman atau permohonan tersebut — P1, kerana menjadi seorang bankrap yang tidak dilepaskan dan tidak mendapat sanksi dari Jabatan Insolvensi untuk memulakan prosiding; P2, kerana tidak mempunyai sebarang kontrak dengan TNB.

Diputuskan, menolak bantahan awal dan membenarkan permohonan plaintif:

(1) P1 telah mendapat sanksi daripada Ketua Pengarah Insolvensi ('KPI') pada Jun 2018 atas tindakannya terhadap TNB dalam tindakan yang lain. Beliau telah mendapat sanksi lain pada Mac 2019 untuk tujuan saman semasa. Sanksi yang dikeluarkan oleh KPI adalah khusus dan hanya boleh digunakan untuk perkara tertentu yang mana sanksi itu diberikan dan tidak dapat digunakan untuk pelbagai prosiding. Oleh kerana P1 mempunyai sanksi yang diperlukan untuk meneruskan tindakan semasa, beliau mempunyai locus standi dan oleh itu bantahan awal terhadap perkara ini tidak mempunyai merit (lihat perenggan 14 & 24).

(2) P2 telah memberikan bukti yang mencukupi, sebagai pembeli hartanah yang dipersoalkan, bahawa beliau mempunyai kepentingan dan perniagaan yang sah di premis tersebut dan akan terjejas sekiranya TNB memutuskan bekalan elektrik. Oleh itu, P2 mempunyai locus standi untuk membuat permohonan semasas (lihat perenggan 27–28).

(3) Dalam *Modernria Plastic Industries (M) Sdn Bhd v Tenaga Nasional Bhd* , *Mayaria Sdn Bhd & Anor v Tenaga Nasional Bhd* [2015] MLJU 276 dan *Xin Guan Premier Sdn Bhd v Tenaga Nasional Bhd* [2016] 10 MLJ 788, mahkamah telah membenarkan injunksi interlokutori terhadap TNB sehingga keputusan terakhir tindakan utama bagi menghalangnya daripada memutuskan bekalan elektrik atas alasan bahawa dengan pembetulan meter yang dirosakkan dalam setiap kes, tidak ada lagi kesalahan yang berlaku untuk TNB bagi memutuskan bekalan elektrik selaras dengan s 38(1) ABE. Sebaliknya, Mahkamah Rayuan dalam *Karun Klasik Sdn Bhd v Tenaga Nasional Bhd* [2018] 3 MLJ 749 tidak bersetuju dengan *Modernria* dan *Mayaria* dan berpendapat bahawa pembuangan meter atau pembetulan tidak akan dengan sendirinya memberikan remedi terhadap kesalahan abstraksi yang menyalahi undang-undang dan selagi TNB masih belum dibayar, elektrik yang digunakan dan tidak dibayar merupakan perbuatan atau kesalahan yang melanggar undang-undang di bawah s 37 ABE. Isu-isu yang dibincangkan dan peringkat dan sifat prosiding dalam Karun Klasik sama sekali berbeza dengan kes semasa. Memandangkan su-isu yang dibincangkan, sifat permohonan dan peringkat prosiding dalam kes semasa agak serupa dengan tiga kes yang disebut terdahulu, mahkamah ini memutuskan untuk mengikuti dan menerapkan penemuan-penemuan di dalamnya (lihat perenggan 38–39, 41 & 43–44).

(4) Isu-isu yang dibangkitkan oleh parti-parti adalah bona fide dan cukup serius untuk merit perbicaraan. Bukti afidavit yang terdapat di peringkat permohonan semasa tidak mencukupi untuk memutuskan isu-isu tersebut secara konklusif. P2 akan mengalami keruian dan ketidakadilan yang lebih besar sekiranya permohonan tidak dibenarkan. Adalah adil dan sesuai untuk injunksi dibenarkan untuk mengekalkan status quo sehinggalah perbicaraan. Keseimbangan kemudahan dan keadilan kes diberikan untuk plaintif (lihat perenggan 45–49).]

Cases referred to

Claybricks & Tiles Sdn Bhd lwn Tenaga Nasional Bhd [2007] 1 MLJ 217; [2006] 4 CLJ 892, CA (refd)

Dai-Ichi Electronics (M) Sdn Bhd lwn Tenaga Nasional Bhd [1996] 4 MLJ 506; [1996] 1 LNS 47, HC (refd)

Karun Klasik Sdn Bhd v Tenaga Nasional Bhd [2018] 3 MLJ 749; [2018] 9 CLJ 184, CA (refd)

Keet Gerald Francis Noel John v Mohd Noor bin Abdullah & Ors [1995] 1 MLJ 193; [1995] 1 CLJ 293, CA (folld)
Mayaria Sdn Bhd & Anor v Tenaga Nasional Bhd [2015] MLJU 276; [2015] 6 CLJ 788, HC (folld)
Modernria Plastic Industries (M) Sdn Bhd v Tenaga Nasional Bhd [2015] 3 CLJ 825, HC (folld)
Ooi Poh Chin v Tenaga Nasional Bhd [2016] MLJU 814; [2016] 1 LNS 1024; [2016] 6 AMR 255, HC (refd)
QSR Brands Bhd v Suruhanjaya Sekuriti & Anor [2006] 3 MLJ 164; [2006] 2 CLJ 532, CA (refd)
Tan Yeong Kim lwn Tenaga Nasional Bhd [2000] MLJU 447; [2000] 8 CLJ 629, HC (refd)
Tenaga Nasional Bhd v Chan Lee Fun & Anor (Civil Appeal No A-04(IM)(NCVC)-348–08 of 2017) (unreported), CA (refd)
Tenaga Nasional Bhd v Mun Chee Chuen & Anor (Civil Appeal No N-02(IM)(NCVC)-581–03 of 2017) (unreported), CA (refd)
Tenaga Nasional Bhd v Restoran Al Ibrahim Maju [2018] MLJU 892; [2018] 1 LNS 925, HC (refd)
WRP Asia Pacific Sdn Bhd v Tenaga Nasional Bhd [2012] 4 MLJ 296; [2012] 4 CLJ 478, FC (refd)
WRP Asia Pacific Sdn Bhd v Tenaga Nasional Bhd & another appeal [2011] 4 CLJ 838, CA (refd)
Xin Guan Premier Sdn Bhd v Tenaga Nasional Bhd [2016] 10 MLJ 788; [2016] 1 CLJ 318, HC (folld)

Legislation referred to

Electricity Supply Act 1990 ss 37 , 37(1), (3), (14), 38, 38(1)
Insolvency Act 1967 s 38(1)
Rules of the High Court 1980 O 53 r 3

Lai Chee Meng (CM Lai & Partners) for the plaintiffs.
Prithi Verma (Prithi, Junainah & Assocs) for the defendant.

Mohd Radzi JC:

[1] Enclosure 4 is an application by the plaintiffs for this court to issue an injunction to prohibit the defendant from disconnecting electricity supplies to the second plaintiff's premise at No 1541, Lorong Kerapu, Taman Sejahtera, 35400 Hutan Melintang, Perak ('said premise').

[2] I had allowed the plaintiffs' application and the defendant is aggrieved by that decision and filed this appeal.

[3] Below are my grounds for that finding.

FACTS

[4] The second plaintiff is a company carrying out the business of seafood processing, freezing and coldstoraging at the said premise.

[5] The said premise originally belonged to the first plaintiff. By way of a sale and purchase agreement dated 31 March 2009, it was bought by the second plaintiff.

[6] During an inspection at the said premise on 15 November 2018, the defendant's employees had discovered tampering of the electricity meters.

[7] Upon such findings, the defendant issued the Notice of Disconnection of Electricity Supply ('NDES') under sub-s 38(1) of the Electricity Supply Act 1990 ('the ESA') on the same date, informing the plaintiffs that the electricity supplies to the said premise would be disconnected on 26 November 2018.

[8] The electricity supplies to the said premise had been registered in the name of the original owner, first plaintiff, ever since the said premise was purchased by the second plaintiff in 2009 until the inspection date.

[9] The second plaintiff pleaded that despite numerous attempts to effect the change in the registered user name for the said premise, the applications had not been approved by the defendant, a claim which the defendant denied.

[10] On 21 November 2018 the plaintiffs filed a writ against the defendant claiming for, inter alia:

(a) a declaration that the plaintiffs did not tamper the meters;

(b) an injunction to prohibit the defendant from disconnecting the electricity supplies to the said premise; and

(c) the NDES dated 15 November 2018 to be declared null and void.

[11] On 26 November 2018, the plaintiffs filed this application in encl 4, premised mainly on the following four grounds:

(a) the second plaintiff has the locus standi to file this application as although the first plaintiff is the registered user of electricity supplies at the said premise, the actual user is the second plaintiff;

(b) as corrective measures had been taken on the alleged tampered meter, the defendant cannot continue with its action to disconnect electricity supplies to the said premise;

(c) any disconnection to be carried out at this juncture would cause irreparable damage to the second plaintiff's business; and

(d) the defendant would not suffer any loss in the event that the disconnection is not carried out at this juncture until the final disposal of the plaintiff's suit.

[12] Apart from replying to the issues raised by the plaintiffs as enumerated above, the defendant argued that the application shall be dismissed *ad limine* as both the plaintiffs lacked locus standi.

FINDING

First preliminary objection: Lack of sanction by the Insolvency Department equals no locus standi for the first plaintiff

[13] The defendant's counsel objected to the first plaintiff being made a party to this application solely on the ground that he lacked the locus standi as he is an undischarged bankrupt and failed to obtain the requisite sanction from the Director General of Insolvency ('DGI').

DGI sanction dated 27 June 2018

[14] The defendant's counsel argued that the sanction issued by the DGI dated 27 June 2018 cannot be used by the first plaintiff for the purposes of this application as a sanction is specific for only one single action. As the said sanction was dated 27 June 2018, it is assumed that the said sanction is specifically meant for the first plaintiff's action in another suit against the defendant, namely Suit No 22NCVC-81–06 of 2018 ('Suit 81–06').

[15] The plaintiffs' counsel argued that the first plaintiff clearly has the locus standi to file the application as the sanction issued by the DGI dated 27 June 2018 is a general sanction and can be used by the first plaintiff for multiple actions. Hence that sanction is applicable for purposes of this application aside from Suit 81–06. Learned counsel further argued that in any event, the DGI had issued a specific sanction for the first plaintiff on 13 March 2019 for the purposes of this suit.

[16] I agree with the defendant's learned counsel that a sanction issued by the DGI is specific only for a particular matter. As such, the sanction dated 27 June 2018 is specific for the purposes of Suit 81–06 only. This is in actual fact evidenced through the plaintiffs' own affirmation on this fact through their affidavit in support of their injunction application for that other Suit 81–06 affirmed by the first plaintiff on 28 June 2018 and exhibited as CTK1.

DGI sanction dated 13 March 2019

[17] Having made my finding on that sanction dated 27 June 2018, I had further perused the other sanction issued by the DGI dated 13 March 2019.

[18] I am satisfied that this particular sanction relates specifically to this current proceeding before me.

[19] I noted, however, in this 13 March 2019 sanction, the DGI used the phrase 'memulakan dan meneruskan tindakan di Mahkamah Tinggi Ipoh bagi Guaman No ... (belum difailkan) ... '.

[20] I cannot fathom why the said sanction did not state the file number of this case in that paragraph, when the title in that sanction letter clearly indicated this suit's number. I took it that the DGI had overlooked to fill up the blank. But as I had ruled earlier that a sanction issued is specific and not meant to be used for multiple proceedings, the said sanction dated 13 March 2019 was undeniably meant for this particular case before me now as the reference number in the said sanction letter mentioning this suit's file number cannot be interpreted otherwise.

[21] Subsection 38(1) of the Insolvency Act 1967provides:

> 38 Insolvency Act 1967:
>
> (1) Where a bankrupt has not obtained his discharge:
>
> (a) the bankrupt shall be incompetent to maintain any action (other than an action for damages in respect of an injury to his person) *without the previous sanction* of the Director General of Insolvency;
>
> (b) ...
>
> (1A) In granting permission under paragraph (1)(c), (d) or (e), the Director General of Insolvency or the court *may impose such conditions as he or it may think fit.* (Emphasis added.)

[22] The words 'previous sanction' means a sanction had been issued by the DGI before the first plaintiff can commence this proceeding.

[23] It is my finding that as the sanction dated 13 March 2019 by the DGI specifically stated the words 'untuk memulakan dan meneruskan ... ' and that sanction did not state anywhere that the said sanction must come into effect on the date of the sanction issued, therefore it is my ruling that the said sanction has a retrospective effect to the date the plaintiffs filed this suit against the defendant. It would have been an exercise in clear vain and futility if the sanction is meant to be effective prospectively.

[24] Based on the above findings, I ruled that the first plaintiff has the requisite sanction and has the locus standi to proceed as a party in this matter. I dismiss the preliminary objection on this point.

Second preliminary objection: Lack of locus standi for the second plaintiff

[25] That there exists no privity of contract between the second plaintiff and the defendant, and the NDES was issued to the first plaintiff as the registered user were not disputed facts.

[26] Learned counsel for the defendant had cited *Ooi Poh Chin v Tenaga Nasional Bhd* [2016] MLJU 814; [2016] 1 LNS 1024; [2016] 6 AMR 255 and *Tenaga Nasional Bhd v Restoran Al Ibrahim Maju* [2018] MLJU 892; [2018] 1 LNS 925 to fortify the defendant's position that the application should be dismissed *ad limine* as the second plaintiff has no locus standi and is also not a registered user with Tenaga Nasional Bhd.

[27] I decided to distinguish the facts of the case before me with those found in the cited authorities. Here, the second plaintiff did not deny that it is not registered with the defendant. But the second plaintiff had exhibited in the affidavit the existence of a sale and purchase agreement that showed it had legally purchased the premise from another party, who was the person that bought the said premise from the first plaintiff through an auction. The fact that the second plaintiff is carrying out the business activities as averred in its affidavit was not challenged by the defendant.

[28] I am satisfied that the second plaintiff had shown sufficient proof, for the purposes of this application, that it has legitimate interest and business at the said premise. I am further satisfied, applying the principle laid down by the Court of Appeal in *QSR Brands Bhd v Suruhanjaya Sekuriti & Anor* [2006] 3 MLJ 164; [2006] 2 CLJ 532, that the second plaintiff had fulfilled 'the threshold of adversely affected' by the intended disconnection of electricity supplies at the premise. The second plaintiff clearly established its locus standi to bring this application. I dismiss the defendant's preliminary objection on this point.

Arguments by both parties for and against injunction

[29] Relying mainly on *Keet Gerald Francis Noel John v Mohd Noor bin Abdullah & Ors* [1995] 1 MLJ 193; [1995] 1 CLJ 293, the plaintiffs argued that they had fulfilled the three requirements laid down by the Court of Appeal in that case, vis:

(a) that the totality of the facts presented before this court discloses a bona fide serious issues to be tried;

(b) after weighing all matters, this court could conclude that the plaintiffs, in particular the second plaintiff, would suffer greater injustice if relief is withheld; and

(c) that it is just and proper for this court to answer affirmatively the plaintiffs' prayer for the issuance of the injunction, as maintaining the status quo will produce a just result for the period between the date of the application and the trial proper.

[30] The plaintiffs further submitted that this court must follow two recent unreported decisions of the Court of Appeal in *Tenaga Nasional Bhd v Mun Chee Chuen & Anor* (Civil Appeal No N-02(IM)(NCVC)-581–03 of 2017) (unreported) and *Tenaga Nasional Bhd v Chan Lee Fun & Anor* (Civil Appeal No A-04(IM)(NCVC)-348–08 of 2017) (unreported) where the court held in both cases that injunction should be allowed to prohibit Tenaga Nasional from disconnecting electricity supplies pending the disposal of main suits, when Tenaga Nasional did not show any prejudicial effect it suffers if the status quo is maintained.

[31] The defendant's opposition on the injunction premised on the main arguments that Tenaga Nasional could disconnect although rectification actions had been done on the alleged tampered meters, and that Tenaga Nasional does not have to show who tampered the meters.

[32] This brings me to consider the issue of Tenaga Nasional Bhd exercising its statutory power of disconnecting the electricity supply under s 38(1) of the ESA, which I regard as the crux of this judgment.

Tenaga Nasional's statutory powers to disconnect

[33] Both parties had argued before me the authorities that laid down the so-called two schools of thought on the question of when could Tenaga Nasional Bhd disconnect the electricity supplies to a premise upon its employees' finding of incidences of meter tampering.

[34] The Court of Appeal in *Claybricks & Tiles Sdn Bhd lwn Tenaga Nasional Bhd* [2007] 1 MLJ 217; [2006] 4 CLJ 892 held that as soon as Tenaga Nasional Bhd found evidence of tampering, it could effect the disconnection 'to halt an on-going offence instantly or speedily'. The brief facts in *Claybricks* are worth reiterating. On 20 May 2005, the High Court granted an interim injunction against Tenaga Nasional's notice to disconnect electricity to the appellant's premise. When the injunction was heard inter partes before the

learned High Court Judge on 17 August 2005, the ex parte injunction was set aside. The learned High Court judge ruled that there was no serious issues for trial as s 38(1) of ESA provided the respondent with full authority to disconnect the electricity supplies. Should the appellant be aggrieved by the action, other forms of remedies are still available to the appellant if it is later found that the said disconnection is premised on mala fide. The appellant then applied at the Court of Appeal for an *Erinford* injunction pending the disposal of the appeal against the said High Court decision. The Court of Appeal decided not to endorse the decision of Vincent Ng J (as he then was) in *Dai-Ichi Electronics (M) Sdn Bhd lwn Tenaga Nasional Bhd* [1996] 4 MLJ 506; [1996] 1 LNS 47. Instead, Their Lordships affirmed the decision of Alauddin Mohd Sheriff J (as His Lordship then was) in *Tan Yeong Kim lwn Tenaga Nasional Bhd* [2000] MLJU 447; [2000] 8 CLJ 629 whom has held that there is no requirement under s 38(1) of the ESA to prove any criminal wrongdoing before s 38(1) could be triggered as that section was drafted in such a way to grant effective authority to TNB to stop any form of wrongdoing and not to allow it to continue. The court further held that:

> ... s 38(1)was specifically provided to safeguard the interest of the respondent and to enable it to act expediently to prevent abuse such as stealing the electricity supplied by the respondent.

[35] *Claybricks* was affirmed further in *WRP Asia Pacific Sdn Bhd v Tenaga Nasional Bhd & another appeal* [2011] 4 CLJ 838, when the Court of Appeal held that s 38 of the ESA provided specifically for the preservation of Tenaga Nasional Bhd's interests and empowered it to act expeditiously to prevent misuse, such as the theft of electricity supplied by it. No offence needed to be proved in court before the power under the section could be invoked. This was in order to ensure swift action could be taken to immediately avoid the further illegal usage by the perpetrator. This decision was further upheld by the Federal Court in *WRP Asia Pacific Sdn Bhd v Tenaga Nasional Bhd* [2012] 4 MLJ 296; [2012] 4 CLJ 478), where the Federal Court held:

> Even though the effect of the letter is quite harsh, s 38 of the Act (the ESA) empowers the respondent to discontinue the supply of electricity based on the subjective finding of its employee if any offence has been found committed under s 37(1), 37(3) or 37(14).

[36] However, it must be emphasised that the main issue before the Federal Court was on the question of leave for a judicial review. Leave was applied for at the High Court by the appellant pursuant to O 53 r 3 of the Rules of the High Court 1980 ('the Rules'), for a judicial review of a decision made by Tenaga Nasional Bhd (the respondent), a decision which aggrieved the appellant. The High Court dismissed the leave application. The appellant then filed the relevant appeal to the Court of Appeal but was dismissed too. At the Federal Court, the bench affirmed the High Court's decision and dismissed the

appeal as 'even though satisfied that the appellant has successfully established the issue of locus standi and factor of time, it failed to establish that the impugned matter falls under public law realm'.

[37] Nantha Balan JC (as His Lordship then was) in *Modernria Plastic Industries (M) Sdn Bhd v Tenaga Nasional Bhd* [2015] 3 CLJ 825, expounded further the principles laid down in *Claybricks* and *WRP Asia* when His Lordship held:

> ... if the offence is continuing, then quite clearly the power under s 38(1) of the Act can be invoked at any time, regardless of whether it is urgent or not and regardless of whether TNB has proven in criminal proceedings that an offence has been committed. But the situation that presents itself in this case is different. In the present case, the offence under s 37(1) of the Act is a past offence and not one which is continuing. Here, TNB has admitted that the meter was replaced on 6 June 2014. Also, there is no suggestion of any tampering of the meter since that date. As such, I must proceed on the basis that there has been no tampering after 6 June 2014 and the position since that date is that the amount of electricity consumed at the said premises is being correctly recorded. Hence, this brings me back to the question as to whether TNB may subsequently invoke the power to disconnect under s 38(1) of the Act in circumstances where there is no longer any tampering or theft of electricity.
>
> In this regard it is clear from the judgment of the Court of Appeal in *Claybricks* and the judgment of the Federal Court in *WRP Asia Pacific* that the power under s 38(1) of the Act is necessary to ensure that TNB is able to immediately severe electricity supply to avoid further illegal usage by the perpetrator. Quite clearly on the facts of the present case, there is no longer any illegal usage by the consumer such as to warrant the invoking of the power to disconnect under s 38(1) of the Act. In this regard, it should be emphasised and borne in mind that the power to disconnect the supply of electricity is a power of limited duration and not a power to deprive the consumer of electricity in perpetuity. (see the proviso to s 38(1) of the Act which allows disconnection for a maximum of three months).

[38] The principle that was laid down in *Modernria* was reemphasised and reaffirmed in *Mayaria Sdn Bhd & Anor v Tenaga Nasional Bhd* [2015] MLJU 276; [2015] 6 CLJ 788 and *Xin Guan Premier Sdn Bhd v Tenaga Nasional Bhd* [2016] 10 MLJ 788; [2016] 1 CLJ 318 where it was held that Tenaga Nasional Bhd could only lawfully disconnect the electricity supply to a consumer's premise 'when the offence is still continuing and conversely cannot if it has since ceased'.

[39] The second school of thought read the decision in *Claybricks* in a slightly different manner. The Court of Appeal in *Karun Klasik Sdn Bhd v Tenaga Nasional Bhd* [2018] 3 MLJ 749; [2018] 9 CLJ 184, disagreed with *Modernria* and *Mayaria* when it held that 'the removal of the impugned meter or rectification of the same does not in itself remedy the offence of unlawful

A abstraction'. The court went on to decide that for as long as the monies due to Tenaga Nasional remained unpaid, 'the electricity effectively remains consumed but unpaid for and therefore remains an unlawful act or offence under s 37'.

B **[40]** This court wishes to compare the facts leading to the application before me now with the facts that led to the decisions in *Modernria* , *Mayaria* , *Xin Guan* and *Karun Klasik* .

C **[41]** *Mayaria* , *Modernria* and *Xin Guan* all dealt with the application for an interlocutory application to restrain Tenaga Nasional Bhd from disconnecting the electricity supply to the said premises pending disposal of the main action. The main contention supporting the application was that there was no lawful basis for Tenaga Nasional to invoke its powers under s 38(1)of the Act since the D rectification works performed upon the discovery of the meter tampering must have meant that the unauthorised interference had been discontinued and thus any further presumed loss of electricity ceased to be an issue. The courts in all three cases had allowed for the injunction against Tenaga Nasional until the final disposal of the main action.

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[42] *Karun Klasik* , on the other hand, dealt with the plaintiff's (Tenaga Nasional) claim for back charges for the use of electricity by the defendant, and the defendant's claims for loss and damages it had suffered due to the plaintiff's trespass, damage to its reputation and wrongful acts of the plaintiff. After a full F trial, the High Court dismissed both the plaintiff's claim and the defendant's counter-claim, which was affirmed by the Court of Appeal.

[43] This court decided to distinguish *Karun Klasik* with the case before me now as the issues discussed, and the stage and nature of proceeding in *Karun* G *Klasik* are totally dissimilar with that in this case.

[44] On the other hand, I found that issues discussed, nature of application and stage of proceeding in *Mayaria* , *Modernria* and *Xin Guan Premier* are somewhat akin to the current case before this court. I therefore decided to H apply and follow the findings therein.

Did the plaintiffs' application fulfilled Keet Gerald's tests?

I **[45]** In determining whether the plaintiffs have established bona fide serious issues to be tried, I am bound by the tests as laid down by the Court of Appeal in *Keet Gerald* , as follows:

(a) I must bear in mind that the pleadings and evidence are incomplete at this stage;

(b) I must refrain from making any determination on the merits of the claim or any defence to it;

(c) I only need to identify the issues and decide whether these are serious enough to merit a trial; and

(d) if at that juncture I find the answer to be in the negative, then the relief for injunction is refused. On the other hand, if the answer is in the affirmative, I would then move on to the next step to determine where does the justice lies.

[46] Thus, whilst it is clear to me upon perusing the affidavits that the pleadings and evidence are incomplete at this stage, and I am not making any determination on the merits of the claim or any defence to it, I had identified and decided that the main issue being the alleged tampering of the meters at the plaintiffs' premises is a serious issue that merit a trial.

[47] I found that the arguments put forth by the defendant concerning:

(a) the facts leading to the issuance of the notice of disconnection;

(b) proof of tampering is not a prerequisite for a disconnection; and

(c) legal position of s 38(1) of ESA,

relate to the merit of the plaintiffs' case. By canvassing those issues in detail at this stage, it provided me with a precursor of what are the issues that I must decide upon. And it is trite that I cannot decide on those issues raised by the defendant at this stage either. The affidavit evidence available at this stage is insufficient. I must conduct a full trial to hear witnesses' evidence to enable me to come to a final decision. Clearly there are bona fide issues to be tried.

CONCLUSION

[48] After weighing all matters as stated in the preceding paragraphs, this court concluded that the plaintiffs, in particular the second plaintiff, would suffer greater injustice if the relief sought is withheld and that it is just and proper for this court to answer affirmatively the plaintiffs' prayer for the issuance of the injunction, as maintaining the status quo will produce a just result for the period between the date of the application and the trial proper.

[49] Consequent to the findings above, and taking into consideration also the nature of the second plaintiff's business, it is my finding that the balance of convenience and justice of the case lies for the plaintiffs. The disconnection at the second plaintiff's premises cannot be allowed to be carried out at this stage.

[50] The plaintiffs' application in encl 4 is allowed with costs ordered to be in the cause.

Preliminary objections dismissed and plaintiffs' application allowed

Reported by Ashok Kumar